

No. 67650-4

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DICKINSON LLC EQUIPMENT COMPANY, LLC,

Appellant,

v.

NORTHWEST PUMP & EQUIPMENT CO., DONALD MAYFIELD
aka DAVE MAYFIELD, and MARK STEINBERGER,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE JAY V. WHITE

BRIEF OF RESPONDENTS

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I. INTRODUCTION

The trial court dismissed claims brought by Dickinson Equipment Company, LLC (“Dickinson LLC”), a former seller of industrial air compressors, against its competitor, respondent Northwest Pump (“NW Pump”), because Dickinson LLC failed to offer any evidence that respondents Donald Mayfield and Mark Steinberger disclosed trade secrets or confidential information in violation of their employment agreements with Dickinson LLC, or that NW Pump violated the Washington Trade Secrets Act by misappropriating any of Dickinson LLC’s trade secrets. The trial court denied Dickinson LLC’s untimely Motion to Stay the Summary Judgment Proceeding under CR 56(f), and Motion for Reconsideration under CR 59(a) because Dickinson LLC’s allegations of spoliation, raised for the first time after the discovery cut-off, were baseless and because Dickinson LLC’s allegations of illegal competition remained devoid of evidentiary support. This court should affirm.

II. RESTATEMENT OF ISSUES

A. Where the customers of a distributor are known to the manufacturer who enters into a distributorship agreement with a competing distributor, is the distributor's customer list a protected "trade secret" under Washington's Uniform Trade Secrets Act?"

B. The trial court refused to enforce overbroad non-disclosure and non-competition clauses as written, entering a preliminary injunction barring only the disclosure of confidential information or trade secrets or the solicitation of Dickinson LLC's former customers, a decision unchallenged on appeal. Did the trial court properly dismiss Dickinson LLC's contract claim on summary judgment one year later, on the eve of trial, and after Dickinson LLC was no longer in business as a distributor, in the absence of any evidence that its former employees disclosed any protected information to their new employer or that any of the defendants actively solicited Dickinson LLC's former customers?

C. Does a trial court abuse its discretion in denying untimely motions to continue the summary judgment hearing under CR 56(f) and to compel discovery, filed after the summary judgment hearing and expiration of the discovery cutoff?

III. RESTATEMENT OF THE CASE

A. Restatement Of Facts.

1. Donald Mayfield And Mark Steinberger Were Hired By Appellant's Predecessor, Dickinson Equipment, Inc., To Service And Sell Sullair Air Compressors.

Respondent Donald Mayfield has worked selling and servicing compressed air equipment service since April 1991. (CP 160) In late 1995, Mayfield became a field technician with Prime Equipment Company, a distributor of Sullair air compressors. (CP 160) Since then, his career has followed the Sullair line of compressor products. (CP 160)

Dickinson Equipment Company, Inc. ("Dickinson Inc.") (predecessor to plaintiff/appellant Dickinson Equipment Co., LLC) was the Pacific Northwest distributor of Sullair air compressor and equipment parts. (CP 4, 21, 79, 163, 338) In November 1998 Dickinson Inc. hired Mayfield as an outside sales representative because of Mayfield's extensive experience selling Sullair air compressors and his familiarity with the Sullair product line. (CP 161) Mayfield was eventually promoted to the position of Seattle Sales Manager in 2003, and promoted to Sales and Marketing Manager in 2004. (CP 161)

In May 2001, Dickinson Inc. hired respondent Mark Steinberger as an outside sales representative. (CP 174) Steinberger had no previous experience with air compressor sales and service. (CP 366) To be brought up to speed, Dickinson Inc. gave Steinberger books to read and field training in the principles of pneumatics. (CP 366)

2. Upon Purchasing Dickinson Inc.'s Assets, Appellant Dickinson LLC Obtained Employment Agreements With Mayfield And Steinberger In 2006.

In September 2006, Ed Tudor ("Tudor") purchased the assets of Dickinson Equipment, Inc. and formed Dickinson Equipment Company, LLC, ("Dickinson LLC") plaintiff below and appellant in this court. (CP 53) As a condition of continued employment with Dickinson LLC, Tudor required Mayfield and Steinberger to sign written employment agreements containing: (1) a non-disclosure agreement, (2) a confidentiality agreement, and (3) a one year non-competition agreement. (CP 69, 74, 161, 171, 175)

The non-disclosure agreements precluded Mayfield and Steinberger from disclosing any information concerning "the equipment, software, systems, products, prices, costs, discounts, future plans, business affairs, processes, trade secrets, technical

matters, customer lists, product design, technical know-how," and other undefined "vital information:"

CONFIDENTIALITY. Employee recognizes that Dickinson has and will have information regarding the equipment, software, systems, products, prices, costs, discounts, future plans, business affairs, processes, trade secrets, technical matters, customer lists, product design, technical know-how, and other vital information (collectively, "Information") which are valuable, special and unique assets of Dickinson. Employee agrees that the Employee will not, at any time or in any manner, directly or indirectly, divulge, disclose, or communicate in any manner any Information to any third party without the prior written consent of the [sic] Dickinson. Employee will protect the information and treat it as strictly confidential. A violation by Employee of this paragraph shall be a material violation of this Agreement and will justify legal and/or equitable relief.

(CP 69, 74)

The non-competition agreements purported to preclude Mayfield's and Steinberger's employment with any company "that is engaged in sales or service of air compressors in the states of Washington, Oregon, Idaho and Montana" for one year following termination of employment:

NON-COMPETE AGREEMENT. Recognizing that the various items of Information are special and unique assets of the company, Employee agrees and covenants that for the term of this agreement and for a period of one year following the voluntary termination of Employee or the involuntary termination for cause, Employee will not directly or indirectly

engage in any business competitive with Dickinson. Directly or indirectly engaging in any competitive business includes, but is not limited to, (i) engaging in a business as an owner, partner, or agent, (ii) becoming an employee of any third party that is engaged in such business, (iii) becoming interested directly or indirectly in any such business, or (iv) soliciting any customer of Dickinson for the benefit of a third party that is engaged in sales or service of air compressors in the states of Washington, Oregon, Idaho, and Montana.

(CP 69, 74)

3. Dickinson LLC's Main Supplier Sullair Refused To Extend Credit To Dickinson LLC And Signed An Agreement With NW Pump To Distribute Its Compressor Products.

Over the next three years, Dickinson LLC began experiencing financial difficulties.¹ (CP 162, 164, 175-76, 338-39) Dickinson LLC asked many employees, including Mayfield, to take salary cuts. (CP 162) Beginning in 2008, Dickinson LLC fell behind in payments to Sullair, its main supplier of air compressors. (CP 163, 338-39) By the middle of 2009, Sullair's customers were not receiving support from Dickinson LLC for Sullair's products. (CP 339) Sullair began to look for another distributor in the Pacific

¹ Dickinson LLC asserts that business was "healthy" in 2008-2009, (App. Br. 9), but its "evidence" to support that conclusory assertion consists entirely of revenue figures, and fails to account for any of the company's liabilities and expenditures. (CP 4-3, 456-97) Dickinson LLC's business health in 2008-2009, even if a disputed issue, is not *material* to the trial court's summary judgment. (CP 163-64, 338-41)

Northwest, researching alternative distribution channels and interviewing companies. (CP 338-39, 342) By the end of 2009, Sullair refused to further extend credit to Dickinson LLC. (CP 339)

NW Pump did not pursue Sullair. Sullair approached NW Pump to serve as a secondary distributor in late 2009 after Sullair performed its own due diligence to find a reliable alternative distributor for Sullair's products. (CP 299, 339) Sullair signed a distributorship agreement with NW Pump in December 2009. (CP 339) Sullair did not immediately terminate its distributorship agreement with Dickinson LLC, maintaining a dual distributorship arrangement with both companies. (CP 339)

4. Mayfield And Steinberger Looked For New Jobs And Were Hired By NW Pump Shortly Before Dickinson LLC Laid Off The Remainder Of Its Staff And Ceased Its Sales And Service Operations.

By the time Sullair signed its agreement with NW Pump in December 2009, Dickinson LLC had already shut down its Billings, Montana office, and had laid off several of its service technicians and parts personnel at its other locations. (CP 339) In March 2010, Dickinson LLC suspended its operations, shutting down its sales and service operations and terminating its remaining

employees. (CP 339) As a consequence, Sullair terminated its distribution agreement with Dickinson LLC. (CP 339-40, 342)

Concerned about their future with Dickinson LLC in late 2009, several of Dickinson LLC's employees, including Mayfield and Steinberger, started to look for employment elsewhere. (CP 163-65, 177, 339) In November 2009, Mayfield applied to NW Pump for employment. (CP 165-66) NW Pump did not then know whether it would receive the Sullair distributorship, and was not specifically looking for salespersons within the air compressor industry. (CP 166, 339) Nevertheless, NW Pump recognized Mayfield's extensive knowledge of rotating machinery, including pumps, as well as his skill and experience in selling mechanical equipment. (CP 166)

NW Pump has a policy of honoring non-compete and non-disclosure provisions in previous employment contracts, and Mayfield provided NW Pump a copy of his Dickinson LLC employment agreement prior to a hiring decision. (CP 84, 166, 178, 298) After examining Mayfield's employment contract with Dickinson LLC, NW Pump hired Mayfield on November 23, 2009 to work in NW Pump's petroleum pump department and to assist in setting up an air compressor department. (CP 84, 166, 292-93)

When Mayfield resigned from Dickinson LLC in November 2009, Steinberger replaced Mayfield as Dickinson LLC's Sales Manager. (CP 177) Steinberger spent much of his time dealing with the deteriorating financial situation at Dickinson LLC, putting off creditors and customers who complained that Dickinson LLC was not honoring their warranty claims, and he began to look for employment elsewhere. (CP 177, 336-37) On January 22, 2010, Steinberger notified Dickinson LLC that he had accepted an air compressor sales position with NW Pump. (CP 177) At Tudor's request Steinberger surrendered his company phone, laptop, and key, leaving the building with only his personal belongings. (CP 177)

In March 2010, Dickinson LLC laid off its employees and ceased servicing customers, resulting in Sullair's termination of its distributorship agreement with Dickinson LLC. (CP 218) Dickinson LLC entered into a licensing agreement with a new company, DEC Service Company, LLC, formed with Beckwith and Kuffel, one of Sullair's competitors, which sells compressors under the trade name Gardner Denver. (CP 217, 339) While Dickinson LLC says that it "merely reorganized the way it conducted its business," (App. Br. 9), it is undisputed that since March 2010 the entity that formerly

employed Steinberger and Mayfield – Dickinson LLC – no longer provides the services that these former employees performed.

B. Procedural History.

Dickinson LLC sued NW Pump, Mayfield, and Steinberger in King County Superior Court on February 22, 2010, alleging trade secrets misappropriation, breach of contract, and violations of the Consumer Protection Act. (CP 1-10) Claiming that it served NW Pump personally and by fax, Dickinson LLC obtained an *ex parte* restraining order on the very next day, February 23, 2010. (CP 138-50)² The TRO enjoined Mayfield and Steinberger from working at NW Pump. (CP 18, 138-50, 151-52)

The TRO also directed NW Pump to produce within seven days: (1) all emails regarding NW Pump's contact with Dickinson LLC customers and prospective customers for air compressor business, and (2) all emails regarding NW Pump's use of Mayfield and/or Steinberger to develop its air compressor business. (CP 148-49) After respondents objected to the breadth and expedited timing of discovery, the court commissioner stayed the order for

² Dickinson LLC conceded that it obtained the *ex parte* order less than 24 hours after its action was filed and served on NW Pump's registered agent. (CP 50, 138) Mayfield and Steinberger disputed receiving any notice of the hearing on the temporary restraining order on or before the date the restraining order was entered. (CP 151-52, 167, 179)

expedited discovery pending the preliminary injunction hearing. (CP 157-58, 859)

On March 12, 2010, the Honorable Jay White (“the trial court”) entered a limited preliminary injunction. (CP 192-94)³ The trial court found that the non-competition provisions of the employment agreements were overly broad in purporting to prohibit *any* employment of Mayfield and Steinberger in the compressor business. (CP 193) The trial court also ordered that Sullair’s current and potential customers could contact NW Pump. (CP 205, 208) However, the trial court enjoined NW Pump, Mayfield and Steinberger from disclosing or using any of Dickinson LLC’s confidential or trade secret information, and enjoined Mayfield and Steinberger from soliciting customers they serviced during their prior employment with Dickinson LLC. (CP 192-94, 207) Mayfield and Steinberger, who had been barred by the TRO from working, resumed their employment with NW Pump subject to the trial court’s restrictions.

³ The trial court on March 20, 2010 clarified its handwritten March 12th preliminary injunction, to state that NW Pump’s objections to Dickinson LLC’s proposed preliminary injunction “accurately reflect the court’s intention as to findings of fact and conclusions of law.” (CP 208; see CP 195-205)

The trial court also refused to grant Dickinson LLC expedited discovery, reinstating the June 20, 2011 discovery cut-off and dispositive motions deadline of July 25, 2011 under the original case scheduling order. (CP 194, 854, 859) Dickinson LLC waited an entire year before seeking written discovery from NW Pump, finally serving discovery requests on April 11, 2011, almost two months before the discovery cutoff. (CP 543) NW Pump timely answered Dickinson LLC's interrogatories and produced over two thousand pages of documents, including internal emails from 2009 and 2010, without waiving its objections to Dickinson LLC's overbroad requests. (CP 557-68)⁴

Dickinson LLC did not file a motion to compel before the June 20, 2011 discovery cutoff. Dickinson LLC first objected to NW Pump's discovery answers one month after the discovery cutoff, in its July 15, 2011 response to NW Pump's summary judgment motion. (CP 349) Dickinson LLC alleged for the first time that NW Pump destroyed some emails that "likely. . . would have been helpful" to Dickinson LLC's case (CP 345, 349, 362), but still did not move to compel or seek a continuance under CR 56(f).

⁴ The documents attached to Dickinson LLC's counsel's declaration reflect that NW Pump produced documents with Bates stamp numbers up to 2378. (CP 587)

During oral argument on the summary judgment motion on July 26, 2011, the trial court repeatedly asked Dickinson LLC's counsel's for specific evidence that supported its accusation that Mayfield and Steinberger had solicited former Dickinson LLC customers or otherwise used confidential information. (7/26 RP 25-26, 29-31, 35-36, 39-41, 45-47, 50-53, 59-61; CP 860) On July 27, one day *after* the summary judgment argument, Dickinson LLC filed a Motion to Shorten Time to Hear Dickinson LLC's Motion to Compel Production of Documents and to Stay the Dismissal Motion Under CR 56(f). (CP 537-38)⁵

On July 28, 2011, the court granted the Motion for Summary Judgment and denied Dickinson LLC's motion to stay or compel. (CP 712-14) The trial court found "no showing of specific facts establishing . . . a genuine issue for trial," and stated that a jury could do no more than "speculate" as to whether there had been any solicitation of Dickinson LLC's prior customers or use of Dickinson LLC's trade secret or confidential information by the Respondents. (CP 714) The court denied Dickinson LLC's Motion to Stay and stated it was "untimely in any event." (CP 711) The

⁵ Dickinson LLC also filed a memorandum addressing issues raised by the court during oral argument. (CP 647) The trial court did not consider the late filed memorandum in reaching its decision. (CP 836) See RAP 9.12.

trial court subsequently denied Dickinson LLC's Motion for Reconsideration under CR 59(a). (CP 715-20, 815-16, 838-39)

IV. ARGUMENT

A. Standard Of Review: This Court Reviews Only The Evidence Relied Upon By The Trial Court In Its Summary Judgment Order, May Not Rely On The Trial Court's Previous Preliminary Injunctive Findings, And Reviews The Trial Court's Denial Of Dickinson LLC's Untimely CR 56(f) Motion And Motion To Compel Discovery For Abuse of Discretion.

Dickinson LLC fails to distinguish between the proper standard of review for summary judgment rulings and the deferential standard applicable to the denial of its untimely motions for a continuance or to compel discovery. Moreover, Dickinson LLC improperly relies on the trial court's findings in granting Dickinson LLC limited preliminary injunctive relief, as well as Dickinson LLC's untimely submissions *after* the trial court heard the motion on summary judgment.

This court reviews an order of summary judgment *de novo*, considering the facts and the inferences from the facts in a light most favorable to the nonmoving party. ***Bremerton Public Safety Ass'n v. City of Bremerton***, 104 Wn. App. 226, 229-30, 15 P.3d 688 (2001). By contrast, this court reviews for abuse of discretion the trial court's refusal to grant a continuance under CR 56(f), or to

compel discovery under CR 26 and CR 37. **Bldg. Indus. Ass'n of Washington v. McCarthy**, 152 Wn. App. 720, 742-43, 218 P.3d 196 (2009). The trial court's refusal to consider an untimely motion to compel, after the discovery cutoff and on the eve of trial, is also reviewed for manifest abuse of discretion. **Apostolis v. City of Seattle**, 101 Wn. App. 300, 304, 3 P.3d 198 (2000).

De novo review on summary judgment is not tantamount to a trial de novo, as Dickinson LLC suggests. "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." RAP 9.12. See **Green v. Normandy Park**, 137 Wn. App. 665, 677-81, 151 P.3d 1038 (2007) (granting motion to strike from appellate brief citations to materials outside summary judgment record), *rev. denied*, 163 Wn.2d 1003 (2008). Moreover, declarations containing inadmissible hearsay and conclusory allegations are insufficient to defeat a motion for summary judgment. CR 56(e) ("affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.") See **State v. (1972) Dan J. Evans Campaign Comm.**, 86 Wn.2d 503, 506-07, 546 P.2d 75 (1976).

Further, the trial court's findings in granting Dickinson LLC limited preliminary injunctive relief are of no significance to the trial court's subsequent decision on summary judgment. Preliminary injunction findings are oriented toward a likelihood of success at the outset. Thus, "findings of fact at the preliminary injunction stage are not as fully fleshed out as at the summary judgment stage . . . ," and are not relevant under CR 56. ***Malletier v. Dooney & Bourke, Inc.***, 561 F. Supp. 2d 368, 382 (S.D.N.Y. 2008); ***League of Women Voters of Washington v. King County Records, Elections & Licensing Services Div.***, 133 Wn. App. 374, 384, 135 P.3d 985 (2006) ("An order granting a preliminary injunction is not a final order, nor a final determination on the merits of the case.").

Where, as here, the court considers summary judgment one year later, after discovery and on the eve of trial, the plaintiff has a different burden – to show that there are material issues of fact as to each element of his or her case:

[A] court's findings and conclusions at the preliminary injunction stage are by nature *preliminary*. They are typically based on an incomplete record, using a different standard (likelihood of success on the merits), and therefore are not binding at summary judgment. Accordingly, Bordelon was not entitled to rely on these findings, but instead was required to cite to affidavits or other record evidence to establish disputed issues of material fact.

Bordelon v. Chicago Sch. Reform Bd. of Trustees, 233 F.3d

524, 528 n.4 (7th Cir. 2000) (citations omitted).

Dickinson LLC disregards these fundamental rules of appellate review, relying on the trial court's preliminary findings and on documents submitted after the summary judgment hearing, and ignoring the trial court's discretionary refusal to consider its untimely motions to continue and compel. RAP 9.12. For instance, Dickinson LLC relies on its principal's declaration submitted on reconsideration for its contention that NW Pump "unabashedly solicited Dickinson customers." (App. Br. 15, *citing* CP 724-25, 728-38; *see also* 7/26 RP 37-39)⁶

Summary judgment is appropriate in a trade secret case when a party fails to meet its burden of proof with evidence generating a genuine issue of material fact as to any element of the plaintiff's case. *See MP Medical, Inc. v. Wegman*, 151 Wn. App. 409, 420, 213 P.3d 931 (2009). The trial court properly granted summary judgment because Dickinson LLC failed to support its

⁶ Dickinson LLC also relies on testimony from former Dickinson LLC service manager Dot Thayer, whose deposition was not submitted until reconsideration, (CP 781; *see* App. Br. 15-16, *citing* CP 780, 798-99, 802-03), and internal NW Pump documents produced in discovery but not submitted to the trial court until after the summary judgment hearing. (App. Br. 15-16, *citing* CP 578, 733-38)

assertion that NW Pump misused Dickinson LLC's confidential or trade secret information with any specific evidence, as opposed to speculation and hearsay. This court should affirm, based on the documents and evidence provided to the trial court, rather than on allegations leveled by Dickinson LLC after that decision was made.

B. Dickinson LLC Could Not Establish That The Identity Of Its Customers Were Protected Trade Secrets Or That NW Pump Actually Misappropriated Any Trade Secrets.

1. The Identity Of Dickinson LLC's Customers Were Not Protected Trade Secrets.

Dickinson LLC could not show that any of the broad categories of information alleged to be confidential under its employee agreements qualified for trade secret protection under Washington's Uniform Trade Secrets Act. While Dickinson LLC claimed that its "know-how," "future plans," and "processes" were protectable trade secret information, (CP 6, 69, 74), it failed to meet its burden on summary judgment by identifying with particularity information that was not generally available to the public or known to third parties. Dickinson LLC's "customer list," the focus of its appellate argument, (App. Br. 21-22), fails to qualify for trade secret protection because its customers were known to third parties,

including Sullair, whose products Dickinson LLC's customers purchased.

The Washington Trade Secrets Act defines a trade secret as:

information, including a formula, pattern, compilation, program, device, method, technique, or process that:
(a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

RCW 19.108.010(4).⁷ Dickinson LLC had the burden of proving a trade secret exists. ***Confederated Tribes of Chehalis Reservation v. Johnson***, 135 Wn.2d 734, 749, 958 P.2d 260 (1998); ***Precision Moulding & Frame, Inc. v. Simpson Door Co.***, 77 Wn. App. 20, 25, 888 P.2d 1239 (1995).

Merely labeling business information "confidential" does not establish the existence of a trade secret. ***MP Medical, Inc.***, 151 Wn. App. at 421 n.40. The plaintiff must show: (1) that the information derives independent economic value from not being

⁷ Because the Washington Trade Secrets Act is a uniform act, cases from other jurisdictions interpreting the Uniform Trade Secrets Act are persuasive authority. RCW 19.108.910; ***Ed Nowogroski Ins., Inc. v. Rucker***, 137 Wn.2d 427, 440-41, 971 P.2d 936 (1999).

generally known or readily ascertainable to others who can obtain economic value from knowledge of its use, and (2) that reasonable efforts have been taken to maintain the secrecy of the information. **Precision Moulding & Frame**, 77 Wn. App. at 25; see also RCW 19.108.010(4). The information must be novel and unique. **Woo v. Fireman's Fund Ins. Co.**, 137 Wn. App. 480, 489, 154 P.3d. 236, *reversed in part*, 161 Wn.2d 43, 164 P.3d 454 (2007). Information already in the public domain or readily ascertainable by proper means by someone who can derive economic benefit from it, regardless of its application, is not novel and derives no independent economic value from not being known. **Precision Moulding**, 77 Wn. App. at 26-27.

To avoid summary judgment, a plaintiff must describe the alleged trade secret with specificity and make "more than a generalized allegation that there was a protectible secret." **ECT Int'l, Inc. v. Zwerlein**, 597 N.W.2d 479, 483 (Wis. App. 1999) (listing cases); see also Restatement (Third) of Unfair Competition § 39, comment d ("A person claiming rights in a trade secret bears the burden of defining the information for which protection is sought with sufficient definiteness to permit a court to apply the criteria for protection"). General and conclusory statements that a competitor

will gain an advantage from an alleged trade secret are insufficient to establish a trade secret. ***Confederated Tribes of Chehalis Reservation v. Johnson***, 135 Wn.2d 734, 749, 958 P.2d 260 (1998); ***McCallum v. Allstate Prop. & Cas. Ins. Co.***, 149 Wn. App. 412, 426, 204 P.3d 944, *rev. denied*, 166 Wn.2d 1037 (2009). Disclosure must be with “*sufficient particularity* to separate it from matters of general knowledge in the trade or of special knowledge of those persons skilled in the trade.” ***Imax Corp. v. Cinema Technologies, Inc.***, 152 F.3d 1161, 1167 (9th Cir. 1998) (emphasis in original) (quotations omitted); see also Restatement (Third) of Unfair Competition § 39, comment d.

Dickinson LLC’s complaint listed six categories of “trade secret” information: (1) equipment information, software and systems, (2) products, prices, costs, and discounts, (3) business affairs and future plans, (4) product design, processes and technical matters, (5) technical know-how, and (6) customer lists of established customers and prospects. (CP 6) Several of these categories of information are not protectible trade secrets as a matter of law. For example, information regarding Dickinson LLC’s “products” or “prices” is public knowledge because it can be “readily ascertain[ed] by proper means” and Dickinson LLC failed to

produce any evidence that these broad categories of information had “independent economic value.” (CP 6, 178)

An employee’s general knowledge regarding his employer’s products that he publicly sold is not protectible trade secret information. ***Ed Nowogroski Ins., Inc. v. Rucker***, 137 Wn. 2d 427, 450, 971 P.2d 936, 941 (1999) (“a former employee may use general knowledge, skills and experience acquired during the prior employment in competing with a former employer”); see also Restatement (Third) of Unfair Competition § 42, comment d (“Information that forms the general skill, knowledge, training, and experience of an employee cannot be claimed as a trade secret by a former employer even when the information is directly attributable to an investment of resources by the employer in the employee.”); ***AMP Inc. v. Fleischhacker***, 823 F.2d 1199, 1202 (7th Cir. 1987) (“an employee is free to take with him general skills and knowledge acquired during his tenure with his former employer”). Thus, Mayfield’s knowledge regarding “product design,” equipment information,” “products,” “prices,” and “technical know-how” is not protectable trade secret information. For one, such information is “generally known” in the industry and can be readily ascertained through proper means. (CP 160)

But more importantly, trade secret case law uniformly rejects as inadequate mere reference to generic categories or “areas” of trade secrets,⁸ and such vague references to “knowledge” of production process,⁹ or use of catch-all phrases, such as the terms “business affairs,” “technical know-how,” or “plans.”¹⁰ The trial court properly rejected Dickinson LLC’s conclusory assertions that its employees’ general knowledge constituted protected secrets particularly given the undisputed fact that Dickinson LLC did not manufacture or design anything – it distributed Sullair’s products. Courts frequently dismiss trade secret claims under CR 56 where, as here, there has been a failure to sufficiently identify the trade

⁸ See, e.g., **Composite Marine Propellers, Inc. v. Van Der Woude**, 962 F.2d 1263, 1266 (7th Cir. 1992) (“It is not enough to point to broad areas of technology and assert that something there must have been secret and misappropriated. The plaintiff must show concrete secrets.”).

⁹ **Combined Metals of Chicago, Ltd. Partnership v. Airtek, Inc.**, 985 F. Supp. 827 (N.D. Ill. 1997) (trade secret disclosure must identify specific, concrete secrets underlying the process of producing catalytic converters); **IDX Sys. Corp. v. Epic Sys. Corp.**, 285 F.3d 581, 583 (7th Cir. 2002) (rejecting “43-page description of the methods and processes underlying” a software program as inadequate description of trade secret because it did not separate secret and non-secret elements of the software program); **Porous Media Corp. v. Midland Brake Inc.**, 187 F.R.D. 598, 600 (D. Minn. 1999) (rejecting “Manufacturing process information” and “The entire process for the design and manufacture” as inadequate descriptions of trade secrets).

¹⁰ See, e.g., **Imax Corp.**, 152 F.3d at 1167; **Universal Analytics, Inc. v. MacNeal-Schwendler Corp.**, 707 F. Supp. 1170, 1177-78 (C.D. Cal. 1989) (rejecting former employer’s trade secret claim based on allegation that former employees were using their “know-how” gained during their prior employment), *aff’d*, 914 F.2d 1256 (9th Cir. 1990).

secret at issue. *IDX Sys. Corp. v. Epic Sys. Corp.*, 285 F.3d 581, 583-84 (7th Cir. 2002).¹¹

Dickinson primarily focuses on its “customer list” as subject to trade secret protection, but the fact that a customer list has been considered a trade secret in other contexts does not prove its status as a trade secret in every case. See, e.g. *Nowogroski*, 137 Wn.2d at 444-49 (discussing how customer lists have and have not been found to be trade secrets depending on facts of case); *MP Medical*, 151 Wn. App. at 420-21 (summary judgment where plaintiff failed to establish that customer list was trade secret). Whether a customer list is protected as a trade secret depends on three factual inquiries: (1) whether the list is a compilation of information; (2) whether it is valuable because unknown to others; and (3) whether the owner has made reasonable attempts to keep the information secret. *Nowogroski*, 137 Wn.2d at 442.

¹¹ See, e.g. *IMAX Corp.*, 152 F.3d at 1167-68 (affirming summary judgment where interrogatory responses failed to specify trade secret claims with sufficient particularity); *Bradbury Co., Inc. v. Teissier-duCros*, 413 F. Supp. 2d 1209, 1222-24 (D. Kan. 2006) (granting summary judgment where plaintiff provided no detail on technology; plaintiff has the burden under the UTSA “to define its trade secrets with the precision and particularity necessary to separate it from the general skill and knowledge possessed by others”); *Callaway Golf Co. v. Dunlop Slazenger Group Americas, Inc.*, 318 F. Supp. 2d 205, 215-16 (D. Del. 2004) (plaintiff made only “conclusory allegations” about golf ball technology, referring generally to information that former employee obtained).

In its opposition to NW Pump's motion for summary judgment, Dickinson LLC failed to raise any substantive arguments (CP 345-50), and its principal's declaration contained no evidence to allow the factfinder to conclude that its customer list was "confidential" or had any independent value. (CP 407-09)¹² The identity of Dickinson LLC's customers was already known to Dickinson LLC's supplier Sullair. (CP 338 (Sullair "started direct invoicing with the Alcan Cable project in Q4 of 2008"); CP 340) In fact, it was undisputed that purchasers of Sullair's compressor products contacted Sullair both before and after March 2010 when Dickinson LLC ceased doing business selling and servicing air compressors. (CP 338-40) See *Widmark v. Northrup King Co.*, 530 N.W.2d 588, 592 (Minn. App. 1995) (rejecting trade secret protection of dealer's customer list given by former employee to successor dealer because customer identities were "readily ascertainable" by manufacturer from dealer's purchase orders).

Dickinson LLC is simply wrong in contending that the trial court held Dickinson LLC's "customer information" constituted a

¹² Dickinson LLC instead made the conclusory allegation that "the evidence in support of [its principals'] claims is stronger now tha[n] it was on March 12, 2010," when the trial court entered its limited preliminary injunction. (CP 348)

“trade secret” within the meaning of RCW 19.108.010(4), (App. Br. 21, 23), or that respondents “conceded” that Dickinson LLC’s information qualified for trade secret protection. (App. Br. 22) NW Pump’s Motion for Summary Judgment specifically alleged that Dickinson LLC failed to “identify which *particular* trade secrets [Respondents] allegedly misappropriated.” (CP 285 (emphasis added)) The trial court correctly granted summary judgment because Dickinson LLC failed to raise any factual issue to support its conclusory assertion that Dickinson LLC’s “information” was protectable under trade secret law.

2. Dickinson LLC Failed To Demonstrate Misappropriation Under The Washington Trade Secrets Act.

Dickinson LLC also failed to raise a triable issue of fact on the key element of misappropriation under the Washington Trade Secrets Act. As the trial court noted on summary judgment a jury could do no more than “speculate” as to whether there had been any use of Dickinson LLC’s trade secret information by the Respondents. (CP 714) Similarly on appeal, Dickinson LLC “may not rely on speculation [or] argumentative assertions . . . [but rather] must set forth specific facts that sufficiently rebut the moving party’s contentions and disclose that a genuine issue as to a material fact

exists.” *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

The misappropriation of a trade secret occurs when there is

- (a) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
- (b) Disclosure or use of a trade secret of another without express or implied consent by a person who:
 - (i) Used improper means to acquire knowledge of the trade secret; or
 - (ii) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was
 - (A) derived from or through a person who had utilized improper means to acquire it,
 - (B) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or
 - (C) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
 - (iii) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

RCW 19.108.010(2). Improper means are defined as “theft, bribery, misrepresentation, breach or inducement of a breach of a

duty to maintain secrecy, or espionage through electronic or other means.” RCW 19.108.010(1).

“[I]t is the burden of the [trade secret plaintiff] to demonstrate that [an alleged trade secret] has actually been misappropriated in order to have a right to a damage award.” ***Petters v. Williamson & Associates, Inc.***, 151 Wn. App. 154, 164, 210 P.3d 1048 (2009), *rev. denied*, 168 Wn.2d 1007 (2010). Proof of mere access to one employer’s confidential information does not establish disclosure or misappropriation by another employer. ***Restaurant Technologies, Inc. v. Allora***, 2008 WL 3843527 (D.N.J. 2008).¹³

When asked by the trial court to identify admissible evidence of misappropriation, Dickinson LLC relied, as it does on appeal, on its principal’s declarations (CP 348), which were conclusory, replete with hearsay, devoid of foundation or any admissible evidence of trade secret misappropriation. As one example, Ed Tudor claimed that “[n]ot only did Northwest acquire [Dickinson LLC’s] lifeblood, but Northwest used [former Dickinson LLC] employees and their

¹³ In a footnote, Dickinson LLC claims that its former employees had access to “information on make and model of equipment, use of equipment, date installed, maintenance done if Dickinson [LLC] did it, prior parts ordered from Dickinson [LLC], frequency of repairs and other proprietary data.” (App. Br. 4 n.1) But even assuming these broad descriptions qualify as trade secrets, Dickinson LLC cites nothing to suggest that Mayfield and Steinberger took this detailed information with them to NW Pump.

confidential Dickinson information to gain an unfair competitive advantage. NW[]Pump's documents show that Northwest is still taking advantage of Dickinson confidential information." (CP 397) This conclusory allegation of wrongdoing cannot be used to defeat a motion for summary judgment. See **Seven Gables Corp.**, 106 Wn.2d at 13.

The Tudor declarations were also based on inadmissible hearsay. For example, Chris Tudor stated that "[m]any of our long-time customers told us that [NW Pump] was telling them that Dickinson was no longer in business and that [NW Pump] had replaced Dickinson as the Sullair distributor." (CP 527-28) Because Tudor's declaration relies on the statements of third parties (Dickinson LLC's unidentified "long-time customers") for the truth of his assertion that NW Pump was calling Dickinson LLC customers, the statement is inadmissible hearsay. ER 801, 802. None of Dickinson LLC's admissible evidence shows any solicitation by NW Pump.

Moreover, Dickinson LLC cannot show misappropriation by citing testimony and documents submitted *after* the summary judgment hearing and that the trial court expressly refused to consider. RAP 9.12. See **Idahosa v. King County**, 113 Wn. App.

930, 936-37, 55 P.3d 657 (2002), *rev. denied*, 149 Wn.2d 1011 (2003). For instance, Dickinson LLC cites no evidence in the summary judgment record to support its assertion that Mayfield or Steinberger “unabashedly solicited Dickinson customers such as Metagenics and Les Schwab,” while at NW Pump. (App. Br. 15, *citing* CP 724-25, 728-38)¹⁴

Dickinson LLC argues that “***Ed Nowogroski Ins.*** is instructive on how this Court must analyze the trade secret issue present in this case,” (App. Br. 20), but the plaintiff in ***Nowogroski*** submitted direct evidence to the Court of “active solicitation” by the defendants. ***Ed Nowogroski Ins.***, 137 Wn.2d at 440 n.4. Dickinson LLC provided no such evidence. Dickinson LLC accused NW Pump of “pirating” away Dickinson LLC’s Sullair customers, which it characterized as its core business, but not a single customer testified to solicitation by respondents. (CP 408) Dickinson LLC provided a list of over 60 customers (CP 408), but failed to

¹⁴ Dickinson LLC also relies on post summary judgment evidence to assert that while at NW Pump, its former employee Dot Thayer, whom Dickinson LLC had laid off, did “an absolutely fantastic job” “making contact with a lot of the old DEC accounts.” (App. Br. 16, *citing* CP 578, 780) (See also 7/26 RP 36-39) Dickinson LLC’s allegations that Mayfield downloaded confidential information on his home computer to provide to NW Pump, (App. Br. 10, *citing* CP 554-55, 636-37), and that NW Pump hired Dickinson LLC service technician John Vansant to service Dickinson LLC customers in Eastern Washington (App. Br. 10, *citing* CP 727, 740), were also first made after the summary judgment hearing.

rebut the undisputed evidence that Sullair directed its Pacific Northwest customers who had purchased Sullair products through Dickinson LLC to look to NW Pump for service and product support *after* Dickinson LLC ceased doing business and formed a new company owned in part by a Sullair competitor. (CP 339-40, 344)

Dickinson LLC's argument proceeds from the mistaken premise that any NW Pump contact with a Dickinson LLC customer is evidence of misappropriation. Dickinson LLC fails to distinguish *the fact* that Dickinson LLC customers themselves initiated contact with NW Pump, from Dickinson LLC's *speculation* that NW Pump initiated contact using confidential information. (App. Br. 15; see also 7/26 RP 45-46) As competitors in the air compressor service market Dickinson LLC and NW Pump are free to solicit the customers of the other so long as they do not do so using wrongfully acquired trade secrets. The record is simply devoid of any evidence that NW Pump misappropriated Dickinson LLC trade secrets, or that Mayfield and Steinberger "unabashedly solicited" Dickinson LLC customers.

3. Dickinson LLC Failed To Establish Any Damages Arising From The Alleged Misappropriation of Trade Secrets.

Dickinson LLC's claim was properly dismissed for the independent reason that Dickinson LLC lacked any evidence that NW Pump's conduct caused it damages.¹⁵ A plaintiff may "recover damages for the actual loss . . . [or] for the unjust enrichment caused by misappropriation that is not taken into account in computing damages for actual loss." RCW 19.108.030(1) (emphasis added). See *Luigino's, Inc. v. Peterson*, 317 F.3d 909, 913 (8th Cir. 2003) (affirming summary judgment on causation), *cert. denied*, 540 U.S. 873 (2003). Dickinson LLC claims that "[i]ts investment in this confidential information was over \$2 million," (App. Br. 4 n.1), but offered no evidence that any act of any defendant caused any compensable damages.

C. Dickinson LLC Had No Right Under Washington Law To Enforce The Overly Broad Restrictive Covenants And Had No Evidence To Support A Claim That Its Former Employees Breached The Covenants Not To Compete or Disclose Confidential Information.

Dickinson LLC's alternative breach of contract claim against Mayfield and Steinberger fails as a matter of law for four separate

¹⁵ Respondents raised the issue of damages when moving for summary judgment. (CP 290)

and independent reasons. First, the covenants against “direct or indirect” competition and disclosure of information of every aspect of Dickinson LLC’s pump business are unenforceable as unlawful restraints of trade. Second, respondents cannot as a matter of law compete with Dickinson LLC because it is no longer in business. Third, there was no evidence that Mayfield and Steinberger violated the covenants, as narrowly interpreted by the trial court in its unchallenged preliminary injunction, by discussing confidential information or soliciting Dickinson LLC’s customers. Fourth, the covenants were void for lack of consideration. Summary judgment was proper for all, or any one, of these reasons.

1. The Non-Compete And Non-Disclosure Provisions Are Unenforceable As Unlawful Restraints Of Trade.

The restrictive covenants that Dickinson LLC sought to enforce are void because they violate Washington’s public policy, which prohibits contracts in restraint of trade. See RCW 19.86.030 (“Every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is hereby declared unlawful”); see also *Sheppard v. Blackstock Lumber Co., Inc.*, 85 Wn.2d 929, 931, 540 P.2d 1373 (1975) (“contracts in general restraint of trade are void and unenforceable”). An employee

generally has “the absolute right to abandon his or her employment at-will.” ***Ford v. Trendwest Resorts, Inc.***, 146 Wn.2d 146, 152, 43 P.3d 1223 (2002). This basic freedom is as necessary to the free flow of labor as an open market is necessary to the free flow of goods and services:

Nobody has ever thought, so far as we can find, that in the absence of some monopolistic purpose every one has not the right to offer better terms to another's employe [sic], so long as the latter is free to leave. The result of the contrary would be intolerable, both to such employers as could use the employe [sic] more effectively and to such employes [sic] as might receive added pay. It would put an end to any kind of competition.

Triangle Film Corp. v. Artcraft Pictures Corp., 250 F. 981, 982 (2nd Cir. 1918) (Learned Hand, J.).

Covenants not to compete and other restrictions on a former employee's actions are thus disfavored and are enforceable only if reasonable. ***Sheppard***, 85 Wn.2d at 931; *see also* ***Wood v. May***, 73 Wn.2d. 307, 311, 438 P.2d 587 (1968); ***Copier Specialists, Inc. v. Gillen***, 76 Wn. App. 771, 773, 887 P.2d 919 (1995) (*citing Sheppard*, 85 Wn.2d at 931). Whether a covenant is reasonable depends on three factors: (1) whether restraint is necessary for the protection of legitimate business interests of the employer, (2) whether it imposes upon the employee any greater restraint than is

reasonably necessary to secure the employer's business or goodwill and (3) whether the degree of injury to the public is such loss of the service or skill of the employee as to warrant non-enforcement of the covenant. ***Copier Specialists***, 76 Wn. App. at 773-74. This court should hold that the employee noncompete and nondisclosure covenants at issue here are unenforceable as a matter of law.

a. Dickinson LLC Did Not Have A Legitimate Interest In Precluding Mayfield's And Steinberger's Further Employment In The Air Compressor Business.

The non-competition agreements purported to preclude Mayfield's and Steinberger's employment for any company "that is engaged in sales or service of air compressors in the states of Washington, Oregon, Idaho and Montana" for one year following their termination of employment. (CP 69, 74) The non-disclosure agreements precluded Mayfield and Dickinson LLC from disclosing in the course of subsequent employment any information concerning "the equipment, software, systems, products, prices, costs, discounts, future plans, business affairs, processes, trade secrets, technical matters, customer lists, product design, technical know-how," and other undefined "vital information." (CP 69, 74)

Dickinson LLC failed to establish a legitimate interest in these sweeping prohibitions.

A court will enforce a restrictive covenant only “to the extent that such restriction is reasonable and necessary to protect a legitimate business interest of the employer.” *Wood*, 73 Wn.2d at 312. Non-compete agreements that are “used to secure employers against employees’ use of labor and skills,” or that are “designed to stabilize a company’s current workforce through unreasonable restraints are similarly unenforceable.” *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 846-47, 100 P.3d 791 (2004) (Madsen, J., concurring). “[A]n employer does not have a proprietary interest in its employees at will or in their skills.” *Schemersahl, Treloar & Co., P.C. v. McHugh*, 28 S.W.3d 345, 350 (Mo. App. 2000) (cited in *Labriola*, 152 Wn.2d at 847 n.6);¹⁶ see also *Woody v. Stapp*, 146 Wn. App. 16, 24, 189 P.3d 807 (2008) (no legitimate business expectancy in continued employment of at will employee).

Because they purport to restrict the free flow of information and commerce, under Washington law employee confidentiality agreements are given the same strict scrutiny as covenants not to

¹⁶ In 2001, the holding in *Schemersahl* was legislatively overruled in part, but courts have continued to adopt its reasoning. See, e.g., *Lazer Inc. v. Kesselring*, 823 N.Y.S.2d 834, 839 (N.Y.Sup., 2005).

compete, and are therefore only enforceable to the extent they are reasonable. **Sheppard**, 85 Wn.2d at 931-32. A confidentiality agreement is reasonable only if it allows “permissible avenues” by which to compete without disclosing confidential information. **Island Air, Inc. v. LaBar**, 18 Wn. App. 129, 138, 566 P.2d 972 (1977). Confidentiality agreements “cannot make secret that which is not secret.” **Dynamics Research Corp. v. Analytic Sciences Corp.**, 400 N.E.2d 1274, 1288 (Mass. App. 1980).

Dickinson LLC could not establish a legitimate interest justifying the sweeping restrictions in its employee noncompete and nondisclosure clauses. Its claims against Mayfield and Steinberger were properly dismissed.

b. The Restraint Imposed By The Covenants Is Greater Than Reasonably Necessary.

Dickinson LLC’s noncompete and nondisclosure provisions are also unenforceable because of their overbreadth. Public policy requires courts to examine restrictive covenants carefully to insure that they are no greater in scope than necessary to protect a legitimately protected employer interest. **Knight, Vale and Gregory v. McDaniel**, 37 Wn. App. 366, 370, 680 P.2d 448 (1984) (limiting enforcement of covenant to clients with whom employee

had contact as a direct result of employment), *rev. denied*, 101 Wn.2d 1025 (1984); see also **Alexander & Alexander, Inc. v. Wohlman**, 19 Wn. App. 670, 687-688, 578 P.2d 530 (1978) (limiting geographic and temporal scope of restrictive covenant not to compete), *rev. denied*, 91 Wn.2d 1006 (1978). The noncompete covenant, by precluding employment within a four-state area stretching over a thousand miles from the Pacific Ocean to the Montana-North Dakota border, is grossly overbroad and unnecessary to protect Dickinson LLC's legitimate interests. See **Perry v. Moran**, 109 Wn.2d 691, 702, 748 P.2d 224, 230 (1987), *modified on reconsideration*, 111 Wn.2d 885, 766 P.2d 1096 (1989) ("A covenant not to compete within a geographical area places greater restrictions on the employee than does a covenant not to service the former employer's client accounts."), *cert. denied*, 492 U.S. 911 (1989).

Dickinson LLC's sweeping non-disclosure provision prohibits Mayfield and Steinberger from using not only undefined "trade secrets" but from discussing even the most basic publicly available information gleaned from years of experience in which Dickinson LLC has no proprietary interest, such as the models of air compressors available for sale, their prices, and their product

design. (CP 178) Read literally, Dickinson LLC could prevent Mayfield and Steinberger from talking with anyone who was independently considering the purchase of an air compressor.

c. Dickinson LLC Failed To Demonstrate Any Public's Interest in Enforcing Its Overbroad Covenants.

Dickinson further failed to demonstrate any public interest that could be furthered by enforcement of its overly broad covenants. To the contrary, public policy favors an employee's "absolute right to abandon his or her employment at-will." *Ford v. Trendwest Resorts*, 146 Wn.2d at 152. Because Dickinson LLC's draconian covenants, which purported to prohibit Mayfield and Steinberger from pursuing any employment in their field of work, furthered neither Dickinson LLC's legitimate interests in protecting proprietary trade secrets nor the public interest in the free movement of labor, the trial court correctly refused to enforce them.

2. Dickinson LLC Has Abandoned Any Challenge To The Trial Court's Refusal To Enforce The Overbroad Restrictive Covenants As Written And Can Show No Right To Injunctive Relief.

Dickinson LLC argues that Mayfield and Steinberger unlawfully "compete" with Dickinson LLC simply because they work for NW Pump, (App. Br. 28), but fails to challenge on appeal the

trial court's limited preliminary injunction and its refusal to enforce Dickinson LLC's restrictive covenants as written. The trial court limited Dickinson LLC's draconian covenants to allow Mayfield and Steinberger to work for NW Pump so long as they did not disclose trade secrets or confidential information, and did not "solicit[] any customers they serviced during their prior employment with Dickinson [LLC]." (CP 192-94, 207) Dickinson LLC has not assigned error to the trial court's preliminary injunction or argued that the trial court erred in limiting the scope of its covenants. RAP 10.3(g) (appellate court will not consider claim of error on appeal in absence of assignment of error and argument).

It is undisputed that Mayfield and Steinberger do not currently "compete" with Dickinson LLC. Since March 2010, Dickinson LLC is no longer engaged in the business of selling and servicing air compressor products. (CP 339) Dickinson LLC only licenses its services to DEC Service Company, LLC, a company formed by Beckwith and Kuffel, a competitor of Sullair. (CP 217-18, 339-40) Because respondents' activities in the air compressor industry do not compete with Dickinson LLC's current operation, the trial court's dismissal was proper for this reason alone.

3. Dickinson LLC Failed To Demonstrate That Mayfield And Steinberger Disclosed Any “Confidential Information.”

The trial court correctly dismissed Dickinson LLC’s contract claims for the same reason it dismissed Dickinson LLC’s trade secret claims – Dickinson LLC failed to demonstrate that its employees possessed and disclosed information protectable under its confidentiality agreement, as opposed to general knowledge of the industry gleaned from their years of experience. Even were this court to hold that the covenants could be enforced to the limited degree authorized by the trial court in its preliminary injunction, it should affirm the dismissal of Dickinson LLC’s claims because Dickinson LLC’s numerous accusations of theft, misappropriation, disclosure and solicitation are unsupported by any evidence that respondents Mayfield and Steinberger had disclosed confidential information, or that respondents Mayfield and Steinberger were soliciting former clients they serviced while at Dickinson LLC.

Washington courts require more than “contact” to prove “solicitation.” *Ed Nowogroski Ins., Inc.*, 137 Wn.2d at 440 n.4. Dickinson LLC failed to provide testimony from even one of its sixty customers to corroborate its allegation of solicitation. (CP 408-09) Even if this court could under RAP 9.12 consider evidence that was

not considered by the trial court on summary judgment, Dickinson LLC's allegations fail to controvert the direct evidence that the former Dickinson LLC customers themselves initiated contact with NW Pump. (CP 166-67, 295, 333-34, 336) Dickinson LLC failed to show any of the respondents' conduct crosses the line established by the trial court in its unchallenged order.

4. The Covenants Are Unenforceable Because Mayfield's And Steinberger's Continued Employment Performing The Same Services For Dickinson LLC Is Not New Consideration.

Dickinson LLC had no claim for breach of Mayfield's and Steinberger's employment agreements for another reason – the agreements, which were signed as a condition of continued employment by Dickinson LLC, were not supported by new consideration. A subsequent agreement, or modification to an original agreement, must have separate consideration to be valid. See *Dragt v. Dragt/DeTray, LLC*, 139 Wn. App. 560, 571, 161 P.3d 473 (2007), *rev. denied*, 163 Wn.2d 1042 (2008). The sufficiency of consideration is reviewed as a question of law, and is often a summary judgment issue. DeWolf and Allen, 25 *Washington Practice, Contract Law and Practice*, § 2:23, at 50-51 (1998).

The Supreme Court has rejected an employer's claim that continued employment and training is sufficient consideration for a covenant not to compete signed by an employee five years after the employee's initial hire. *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 834, 100 P.3d 791 (2004). The Court held that "[i]ndependent, additional, consideration" is required where an employee enters into a subsequent contract with its employer. *Labriola*, 152 Wn.2d at 834.¹⁷ The *Labriola* Court's reasoning applies to *any* bilateral agreement entered into by an employee after the initial hire, encompassing both the non-disclosure provisions signed by Mayfield and Steinberger, as well as the non-competition clauses contained in the employment agreements signed years after they were initially hired by Dickinson Equipment, Inc.

Dickinson LLC argues that Mayfield and Steinberger were not continuing their former employment because they signed their agreements with a new entity after Ed Tudor purchased Dickinson Inc. (App. Br. 27 n.14) But Dickinson LLC has maintained in this

¹⁷ Other courts similarly require independent consideration for an employee's agreement to enter into a restrictive covenant after his or her initial hire. See, e.g., *National Risk Management, Inc. v. Bramwell*, 819 F.Supp. 417, 429 (E.D. Pa. 1993); *Poole v. Incentives Unlimited, Inc.*, 548 S.E.2d 207, 209 (S.C. 2001); *Hejl v. Hood, Hargett & Associates, Inc.*, 674 S.E.2d 425, 428-429 (N.C. App. 2009).

action that there is no difference between the various Dickinson entities, arguing that each succeeding Dickinson company may rely on the rights obtained from the former. For instance, Dickinson LLC fails to distinguish its own information from information that Mayfield and Steinberger acquired while working for the former company Dickinson Inc. (App. Br. 4) Dickinson LLC also argues, that despite the termination of Dickinson LLC's contracts and employees in March 2010, Dickinson LLC continued to do business by licensing its customer list to the newly formed entity DEC Services, LLC. (App. Br. 9) The doctrine of judicial estoppel prevents Dickinson LLC from maintaining such inconsistent positions in this litigation. See ***Cunningham v. Reliable Concrete Pumping, Inc.***, 126 Wn. App. 222, 224-25, 108 P.3d 147 (2005). Mayfield's and Steinberger's continued employment in the same position, doing exactly what they did before, cannot support the restrictive covenants contained in their employment agreements.

D. Dickinson LLC's Untimely Allegation Of Spoliation Does Not Raise An Inference That Misappropriation Occurred, And Is Insufficient To Defeat Summary Judgment.

The trial court did not err in rejecting Dickinson LLC's untimely allegations of spoliation. Dickinson LLC alleges that it was relieved of its burden of establishing a material issue of

misappropriation based on its counsel's allegation that NW Pump destroyed emails more than 90 days old. (CP 362) Its argument is not only unsupported by any evidence, but it has been waived because it was not timely raised below.

“Spoliation” is “a term of art, referring to the legal conclusion that a party’s destruction of evidence” was “both willful *and* with an improper motive.” Tegland, 5 *Washington Practice: Evidence*, § 402.6, at 285-86 (5th ed,2007); *see also Henderson v. Tyrrell*, 80 Wn. App. 592, 609-10, 658, 910 P.2d 522 (1996). The “spoliation” doctrine allows the fact finder to draw an inference that the destroyed evidence would be “unfavorable.” *Homeworks Const., Inc. v. Wells*, 133 Wn. App. 892, 898, 138 P.3d 654 (2006).

No evidence supports Dickinson LLC’s contention that NW Pump “had been routinely destroying documents relevant to the controversy.” (App Br. at 17)¹⁸ To the contrary, Dickinson LLC’s counsel’s untimely declaration included numerous NW Pump

¹⁸ Dickinson LLC cites its counsel’s declaration that attached no documents or evidentiary basis for his statement that “Northwest Pump disclosed” that it had destroyed emails likely to have been helpful to plaintiff. (CP 362) Similarly, in a declaration submitted after summary judgment and not considered by the trial court, Dickinson LLC’s counsel alleged NW Pump’s counsel “wrote” to Dickinson LLC’s counsel, stating NW Pump had destroyed requested emails (CP 545), but did not attach any correspondence or provide any other “evidence” of spoliation.

emails from February through June 2010, refuting its contention that NW Pump had destroyed all emails that were more than 90 days old. (CP 591-94)

Moreover, Dickinson LLC did not seek written discovery for over one year after it obtained its preliminary injunction, which contained no requirement that NW Pump maintain emails from 2009 or any other evidence. (CP 192-94, 206-08) No court order required NW Pump to preserve its emails, as the *ex parte* temporary restraining order requiring expedited discovery was vacated one week after it was entered, when the court reinstated the normal discovery timeline from the case schedule order. (CP 854, 859)

Dickinson LLC did not move to compel discovery until *after* summary judgment and after the discovery cutoff. (CP 537) Dickinson LLC waived its spoliation argument by depriving the trial court of the opportunity to make a full inquiry regarding NW Pump's objections and the circumstances that could justify, or negate, appropriate sanctions. As the trial court found in denying Dickinson LLC's untimely motion to compel, Dickinson LLC waived its argument by waiting until after the discovery cutoff to raise its claim of spoliation. See ***Morse Diesel Int'l, Inc. v. United States***, 81 Fed.Cl. 220 (2008) (denying motion for spoliation sanctions as

untimely where “Plaintiff decided to wait until *after* the court ruled” against it on summary judgment) (emphasis in original).

E. The Trial Court Did Not Abuse Its Discretion By Denying Dickinson LLC’s Motion For A CR 56(f) Continuance Or Motion To Compel That Was Filed After The Summary Judgment Hearing, And In Denying Reconsideration.

The trial court did not abuse its discretion in denying Dickinson LLC’s untimely CR 56(f) motion and motion to compel. (App. Br. 28-31) Under CR 56(f) a party seeking to continue a summary judgment hearing must make the request in opposing the motion. See *Bldg. Indus. Ass’n of Washington v. McCarthy*, 152 Wn. App. 720, 742-43, 218 P.3d 196 (2009). Similarly, a court does not abuse its discretion by requiring the parties to adhere to the discovery deadlines established by its own case schedule order. *Apostolis v. City of Seattle*, 101 Wn. App. 300, 304-05, 3 P.3d 198 (2000).

Even had Dickinson LLC timely sought to continue the summary judgment hearing, a trial court has the discretion to deny a continuance if “(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired

evidence will not raise a genuine issue of material fact.” **Janda v. Brier Realty**, 97 Wn. App. 45, 54, 984 P.2d 412 (1999).

The trial court did not manifestly abuse its discretion here. Dickinson LLC did not offer any reason for filing its CR 56(f) motion *after* the summary judgment hearing. Dickinson LLC offers no explanation why it could not provide the court the deposition testimony taken two months before the July 26, 2011 summary judgment hearing. (CP 548) Indeed, Dickinson LLC acknowledged at the summary judgment hearing that it could have submitted additional evidence, but that it simply chose not to. (7/26 RP 62: “we did not bring in all of the materials that we have”).¹⁹

Dickinson LLC’s untimely motion to compel failed to demonstrate that the additional evidence it sought would have created an issue of material fact. See **Thongchoom v. Graco Children’s Products, Inc.**, 117 Wn. App. 299, 308-09, 71 P.3d 214 (2003) (The motion to compel “was merely an assertion that the materials requested in the interrogatories and requests for

¹⁹ The Thayer and McClellan depositions were taken on May 20, 2011, and June 9, 2011. (CP 632, 793) The Ed Tudor declaration presents discovery materials that were available at the time of summary judgment, as did Dickinson LLC’s counsel’s declaration. (*E.g.*, CP 781-82 (referring to deposition of Thayer); CP 807-11 (submitting employment agreement between Thayer and Dickinson LLC))

production were in the scope of discovery They had no knowledge that any of the information would be favorable to their case. A continuance would not have been justified.”), *rev. denied*, 151 Wn.2d 1002 (2004); see also ***Manteufel v. Safeco Ins. Co. of Am.***, 117 Wn. App. 168, 175 n.5, 68 P.3d 1093 (affirming trial court’s refusal to consider counsel’s declaration as basis for a continuance), *rev. denied*, 150 Wn.2d 1021 (2003). The trial court did not abuse its discretion in denying Dickinson LLC’s motion for a continuance or motion to compel.

Similarly, the trial court did not abuse its discretion in denying the motion for reconsideration under CR 59. The summary judgment hearing affords the parties ample opportunity to present evidence. “If the evidence was available but not offered until after that opportunity passes, the parties are not entitled to another opportunity to submit that evidence.” ***Wagner Development, Inc. v. Fidelity & Deposit Co. of Maryland***, 95 Wn. App. 896, 907, 977 P.2d 639 (affirming denial of motion for reconsideration because additional evidence “was available when the parties filed their motions for summary judgment”), *rev. denied*, 139 Wn.2d 1005 (1999). The trial court correctly refused to reconsider its summary judgment ruling under CR 59 because by Dickinson LLC’s own

admission (7/26 RP 62), the materials it sought to introduce on reconsideration were available at the time of the summary judgment hearing. This court should affirm.

V. CONCLUSION

This Court should affirm the dismissal of Dickinson LLC's claims.

Dated this 5th day of March, 2012.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on March 5, 2012, I arranged for service of the foregoing Brief of Respondents, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 5th day of March 2012.



Victoria K. Isaksen

No. 67650-4

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DICKINSON LLC EQUIPMENT COMPANY, LLC,

Appellant,

v.

NORTHWEST PUMP & EQUIPMENT CO., DONALD MAYFIELD
aka DAVE MAYFIELD, and MARK STEINBERGER,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE JAY V. WHITE

UNPUBLISHED AUTHORITY CITED IN BRIEF OF
RESPONDENTS

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H

United States Court of Federal Claims.
MORSE DIESEL INTERNATIONAL, INC., d/b/a
Amec Construction Management, Inc., Plaintiff,
v.
The UNITED STATES, Defendant.

No. 99-279C.
April 7, 2008.

Background: Contractor brought consolidated breach of contract actions against the United States. Government asserted counterclaims under the Anti-Kickback Act and the False Claims Act. After determinations that contractor violated the Anti-Kickback Act, 74 Fed.Cl. 601, and the False Claims Act, the government moved for partial summary judgment for civil penalties under the Anti-Kickback Act and civil penalties and damages under the False Claims Act which was granted, 79 Fed.Cl. 116. Plaintiff subsequently moved for spoliation sanctions.

Holdings: The United States Court of Federal Claims, Braden, J., held that:

- (1) adverse inference sanction for spoliation of evidence was not warranted, and
- (2) Court would not use its inherent authority to sanction government for spoliation of evidence.

Motion denied.

West Headnotes

[1] Federal Courts 170B  **1112**

170B Federal Courts
170BXII Claims Court (Formerly Court of Claims)
170BXII(B) Procedure
170Bk1112 k. Discovery, Subpoenas, and Compelling Production of Evidence. Most Cited Cases

“Spoliation” is the destruction or significant al-

teration of evidence, or failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.

[2] Federal Courts 170B  **1112**

170B Federal Courts
170BXII Claims Court (Formerly Court of Claims)
170BXII(B) Procedure
170Bk1112 k. Discovery, Subpoenas, and Compelling Production of Evidence. Most Cited Cases

The Court of Federal Claims has authority to impose spoliation sanctions based on its inherent power to control the judicial process and litigation or based on Court rule when the spoliation violates a specific court order or disrupts the court's discovery regime. RCFC, Rule 37, 28 U.S.C.A.

[3] Federal Courts 170B  **1112**

170B Federal Courts
170BXII Claims Court (Formerly Court of Claims)
170BXII(B) Procedure
170Bk1112 k. Discovery, Subpoenas, and Compelling Production of Evidence. Most Cited Cases

If a court imposes spoliation sanctions, they should be designed to: (1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.

[4] Federal Courts 170B  **1112**

170B Federal Courts
170BXII Claims Court (Formerly Court of Claims)
170BXII(B) Procedure
170Bk1112 k. Discovery, Subpoenas, and

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Compelling Production of Evidence. Most Cited Cases

An adverse inference is an appropriate sanction for spoliation when evidence has been destroyed and: (1) the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the records were destroyed with a culpable state of mind; and (3) the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

[5] Federal Courts 170B 1112

170B Federal Courts

170BXII Claims Court (Formerly Court of Claims)

170BXII(B) Procedure

170Bk1112 k. Discovery, Subpoenas, and Compelling Production of Evidence. Most Cited Cases

Adverse inference sanction for spoliation of evidence was not warranted by destruction of draft reports and emails concerning assessments of damages that government auditor provided to government counsel, where auditor's views about damages were irrelevant and were not considered by the Court of Federal Claims. RCFC, Rule 37, 28 U.S.C.A.

[6] Federal Courts 170B 1112

170B Federal Courts

170BXII Claims Court (Formerly Court of Claims)

170BXII(B) Procedure

170Bk1112 k. Discovery, Subpoenas, and Compelling Production of Evidence. Most Cited Cases

Court of Federal Claims would not use its inherent authority to sanction government for spoliation of evidence, where plaintiff failed to demonstrate that any relevant evidence was destroyed, and plaintiff's motion for sanctions was untimely.

*220 James D. Wareham, Paul Hastings, Janofsky

& Walker LLP, Washington, D.C., counsel for Plaintiff.

Domenique Grace Kirchner, United States Department of Justice, Washington, D.C., counsel for Defendant.

***221 MEMORANDUM OPINION AND ORDER**
BRADEN, Judge.

I. RELEVANT BACKGROUND AND PROCEDURAL HISTORY.

On October 31, 2007, the court issued a Memorandum Opinion and Order granting the Government's May 18, 2007 Motion for Partial Summary Judgment and awarding the Government \$259,457.04, under the Anti-Kickback Act, and \$7,022,666, under the False Claims Act, for a total of \$7,282,123. *See Morse Diesel Int'l, Inc. v. United States*, 79 Fed.Cl. 116, 129 (2007).^{FN1} On November 14, 2007, Plaintiff filed a Motion For Spoliation Sanctions ("Pl.Mot."), together with a Memorandum Of Law In Support Of Plaintiff's Motion For Spoliation Sanctions ("Pl.Mem.") and ten Exhibits requesting the court to "impose sanctions upon the Government for the Government's object failure" to preserve relevant documents. *See* Pl. Mot. at 1.

FN1. A more complete history of this litigation can be found in: the July 15, 2005 Memorandum Opinion in *Morse Diesel Int'l, Inc. v. United States*, 66 Fed.Cl. 788 (2005) (determining that Plaintiff's progress payment application for performance and payment of bond premiums and certificates for four federal contracts violated the Anti-Kickback Act); the February 1, 2006 Memorandum Opinion in *Morse Diesel Int'l, Inc. v. United States*, 69 Fed.Cl. 558 (2006) (granting the Government's motion to transfer certain General Services Board of Contracting Appeals cases); the January 26, 2007 Memorandum Opinion in *Morse Diesel Int'l, Inc. v. United States*, 74 Fed.Cl. 601 (2007)

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(determining that Plaintiff violated the False Claims Act on six occasions), *as revised*, *Morse Diesel Int'l, Inc. v. United States*, No. 99-279C, slip. op. (Fed. Cl. June 29, 2007); and the October 31, 2007 Memorandum Opinion in *Morse Diesel Int'l, Inc. v. United States*, 79 Fed.Cl. 116 (2007) (awarding the Government damages under the Anti-Kickback Act and False Claims Act).

On December 26, 2007, the Government filed an Opposition To Plaintiff's Motion For Spoliation Sanctions ("Gov't Op.") together with an Appendix ("A ___"). On January 11, 2008, Plaintiff filed a Reply and three Exhibits. On January 30, 2008, the Government filed a Motion For Leave To File A Surreply. On February 1, 2008, the court granted the Government's Motion and the Government filed a Surreply on the same day. On February 15, 2008, Plaintiff filed a Motion For Leave To File Plaintiff's Response To The Government's Surreply. On February 29, 2008, the Government Filed a Motion For Leave To File Declaration Of John Walsh And Response To Plaintiff's February 15, 2008 Motion. On March 10, 2008, Plaintiff filed a Reply. On March 11, 2008, the court granted Plaintiff's February 15, 2008 Motion For Leave To File A Response To The Government's Surreply and denied the Government's February 29, 2008 Motion For Leave To File Declaration Of John Walsh. Plaintiff filed a Response To The Government's February 1, 2008 Surreply on the same day.

II. DISCUSSION.

Plaintiff argues that General Services Administration Office of Inspector General Audit Manager John Walsh, who is a "critical fact witness and the Government's damages expert," destroyed documents relating to the pending litigation, because the Government failed to inform him that certain documents must be preserved in anticipation of litigation. *See* Pl. Mem. at 13-14, 17.

[1][2][3] "Spoliation is the destruction or significant alteration of evidence, or failure to preserve

property for another's use as evidence in pending or reasonably foreseeable litigation." *United Med. Supply Co. v. United States*, 77 Fed.Cl. 257, 263 (2007) (quoting *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir.1999)) (citation omitted). The court has authority to impose spoliation sanctions based on the "inherent power to control the judicial process and litigation" or based on Rule of the Court of Federal Claims 37, when "the spoliation violates a specific court order or disrupts the court's discovery regime." *Id.* at 263-64 (citations omitted); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 45, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) (observing that federal courts have the inherent power to "fashion an appropriate sanction for conduct which abuses the judicial process."). Accordingly, it is well established that a trial court "has broad discretion in fashioning an appropriate sanction, including the discretion to delay the start of a trial, ... to declare a mistrial if *222 trial has already commenced, or to proceed with a trial and give an adverse inference instruction." *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir.2002) (citation omitted). If a court imposes sanctions, the they should be designed to:

- (1) deter parties from engaging in spoliation;
- (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and
- (3) restore the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.

West, 167 F.3d at 779 (quotations omitted).

[4] Plaintiff asks the court to impose an adverse inference sanction on the Government for failing to preserve evidence, reverse the ruling in *Morse Diesel Int'l, Inc.*, 79 Fed.Cl. 116, or adopt Plaintiff's damages theory. *See* Pl. Mem. at 17-18, 31; *see also Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 78 (3d Cir.1994) ("Such evidence permitted an inference, the 'spoliation inference,' that the destroyed evidence would have been unfavorable to the position of the offending party."). The United States Court of Appeals for the Federal Circuit has

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held that an adverse inference is appropriate when:

[E]vidence has been destroyed and “(1) ... the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) ... the records were destroyed with a culpable state of mind; and (3) ... the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.”

Jandreau v. Nicholson, 492 F.3d 1372, 1375 (Fed.Cir.2007) (quoting *Residential Funding Corp.*, 306 F.3d at 107). The burden of establishing each element is on the party seeking an adverse inference. *Id.*

[5] In this case, even assuming, *arguendo*, that the Government improperly handled evidence, the court has determined that the evidence at question is not “relevant to the [Plaintiff's] claim or defense.”

The court ... rejects Plaintiff's protestations of prejudice, because a GSA auditor corrected his initial deposition testimony by admitting that unknowingly he may have destroyed draft reports and e-mails concerning assessments of damages that he provided to Government counsel.... Aside from the fact that these documents may have been subject to deliberative process and/or attorney-client privileges, *Mr. Walsh's views about damages were not considered by the court, as they are irrelevant.*

Morse Diesel Int'l, Inc., 79 Fed.Cl. at 125 n. 8. (emphasis added). Therefore, Plaintiff has not met the burden of establishing the elements allowing the court to impose an adverse inference.

[6] In addition, Plaintiff has deposed Mr. Walsh on five separate occasions since the beginning of this litigation. *See* A32-37 (Aug. 3, 1999); A80-131 (May 16-17, 2002); A383-97 (May 29, 2002); A401 (May 4, 2007); A503-04, 520-21 (Aug. 29, 2007). On August 10, 2007, the court in-

formed the parties that counsel may supplement the briefing with Mr. Walsh's August 29, 2007 deposition testimony, but the court was not planning to delay the next stage of litigation. *See* 8/10/07 TR at 10. On September 17, 2007, the court informed the parties that it planned to rule on the pending summary judgment motion and the parties did not object. *See* 9/17/07 TR at 7-8. Moreover, between the final deposition of Mr. Walsh on August 29, 2007 and the court's October 31, 2007 Memorandum Opinion and Order, Plaintiff failed to file a motion regarding spoliation sanctions. Instead, Plaintiff decided to wait until *after* the court ruled on the Government's May 18, 2007 Motion For Partial Summary Judgment. Therefore, the court also views Plaintiff's November 14, 2007 Motion For Spoliation Sanctions as untimely.

Finally, Plaintiff seeks sanctions under the court's inherent authority. *See* Pl. Mem. at 15 (“The instant motion seeks sanctions under the [c]ourt's inherent authority because there is no discovery order currently at issue in the case.”). As the United States Supreme Court instructed: “[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion.” *223*Chambers*, 501 U.S. at 44, 111 S.Ct. 2123; *see also Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980) (“Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion.”) (citation omitted). Therefore, the court should “construct spoliation sanctions that are narrowly tailored to the abuses revealed.” *United Med. Supply Co.*, 77 Fed.Cl. at 270. In light of Plaintiff's failure to demonstrate the destruction of any relevant evidence and the delay in filing this motion, the court declines to sanction the Government.

III. CONCLUSION.

For these reasons, Plaintiff's November 14, 2007 Motion For Spoliation Sanctions is denied.

IT IS SO ORDERED.

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